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EXAMINER

METZMAIER, DANIEL S

ART UNIT

PAPER NUMBER

1712

DATE MAILED: 06/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/088,980

Applicant(s)

HATCHMAN ET AL.

Examiner

Daniel S. Metzmaier

Art Unit

1712

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 March 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-6 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

### DETAILED ACTION

Claims 1-6 are pending.

#### ***Priority***

1. Receipt is acknowledged of papers received in this national stage application from the International Bureau (PCT Rule 17.2(a)), submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

#### ***Bibliographic data - Oath/Declaration***

2. The examiner has corrected the bibliographic data to reflect the third inventor, i.e., John Hawkins, and forwarded said change for processing.

#### ***Specification***

3. Applicant is reminded of the proper content of an Abstract of the Disclosure.

In chemical patent abstracts for compounds or compositions, the general nature of the compound or composition should be given as well as its use, e.g., "The compounds are of the class of alkyl benzene sulfonyl ureas, useful as oral anti-diabetics." Exemplification of a species could be illustrative of members of the class. For processes, the type reaction, reagents and process conditions should be stated, generally illustrated by a single example unless variations are necessary.

Complete revision of the content of the abstract is required on a separate sheet.

#### ***Claim Objections***

4. Claim 4 is objected to because of the following informalities: the penultimate line should read "particle size" rather than "particle site". Appropriate correction is required.

#### ***Claim Rejections - 35 USC § 101 & 35 USC § 112***

5. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

7. Claims 1 and 2 provide for the use of "a protolamellar aqueous surfactant", but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Claims 1-2 are rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101. See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

Claims 1 and 2 will not be further treated on the merits in view of the above rejections.

***Claim Rejections - 35 USC § 102***

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claim 3 is rejected under 35 U.S.C. 102(b) as being anticipated by Henkel KGAA, FR 2,759,607 A (hereafter Henkel), as evidenced by Derwent Abstract AN 1998-323821. Henkel (page 3, lines 4-22; page 4, line 7, to page 5, line 9; page 6, line 16, to

page 7, line 10; page 14, lines 3-33; and table 1; and Derwent Abstract) discloses pearlescent concentrates employing ethylene glycol distearate, anionic sulfates, and coemulsifiers and characterizes said compositions as lamellar gels having an isotropically clear phase enabling the excellent pearly luster rather than a cloudy appearance (see Derwent Abstract). The disclosed compositions would have inherently provided the protolamellar structure based on the components and the characterization of the compositions as lamellar and providing an excellent pearly luster in the concentrate.

10. Claim 3 is rejected under 35 U.S.C. 102(b) as being anticipated by Lion Corp, DE 36 17 306 A (hereafter Lion), as evidenced by Derwent Abstract AN 1986-320274. Lion (claims 1, 3, and 4; page 5, lines 34, to page 6, line 17; page 7, line 26, to page 8, line 7; page 9, lines 4-6; page 10, line 33, to page 11, line 15; page 12, lines 7, to page 14, line 15; example 1; table III; page 18, lines 1-19; examples 19, 20; table IV; and Derwent Abstract) discloses pearlescent concentrates employing ethylene glycol distearate, anionic sulfates, and coemulsifiers and characterizes said compositions as having an isotropically clear phase enabling the pearly luster appearance (see Derwent Abstract). The disclosed compositions would have inherently provided the protolamellar structure based on the components and the characterization of the compositions as lamellar and providing an excellent pearly luster in the concentrate.

***Claim Rejections - 35 USC § 103***

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

13. Claims 3-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Horiuchi et al, US 4,486,334, in view of Hawkins, US 5,952,285, and Albright & Wilson LTD, AU-A-16451/95.

Horiuchi et al (abstract, examples, and claims) disclose aqueous pearlescent concentrate compositions comprising 3 to 45 wt% of a pearlizing agent including ethylene glycol distearate, and 30 to 50 wt% of sodium polyoxyethylene lauryl ether sulfate as a middle phase ( $M_1$  phase) liquid crystals. Horiuchi et al (column 3, lines 46 et seq; examples; and claims) discloses the formation of the middle phase liquid crystals by dispersing the pearlescent agent above the melting point (i.e., 50 to 80° C) followed by cooling to form the pearlizing agent. Horiuchi et al (column 4, lines 6 et seq) further teaches the specific surfactant concentration can be determined by the limitation

of the pearlizing agents, which can be solubilized in the micelles at a concentration of 3 to 45 wt% of pearlizing agent.

Horiuchi et al differs from the claims in the further addition of electrolyte, an explicit disclosure of the pearlizer particle size and the particular concentration ranges claimed.

Hawkins (abstract; column 7, lines 54 et seq) discloses the addition of electrolyte to middle phase liquid crystalline ((hexagonal or cubic symmetry) resulting in an pourable optically isotropically liquid composition. Hawkins (column 20, lines 6-10; and column 24, Table II) teaches chloride salts and exemplifies 1 wt% of sodium chloride.

Hawkins (column 17, lines 29 et seq) further teaches increasing the cloud point of surfactants by the addition of small amounts of sodium chloride.

Albright & Wilson further teach the formation of pearlescent concentrate compositions. Albright & Wilson (page 2 and examples) discloses ethylene glycol mono- and distearate mixtures as pearlizing agents. Albright & Wilson (claims 14 and 15 and figures) discloses the particles size for said pearlizing agents in the suspensions are that at least 90% of the particles are 5 to 20 microns.

These references are combinable because they teach surfactant compositions having liquid crystalline structures and modifications thereof by varying concentrations and materials. It would have been obvious to one of ordinary skilled in the art at the time of applicants' invention to add sufficient sodium chloride to the compositions of Horiuchi et al for the advantage of forming an optically isotropically liquid composition and the added advantage of handling ease esthetic appearance of the concentrates.

The particles sizes would have been obvious to one of ordinary skilled in the art at the time of applicants' invention as conventional sizes shown in the Albright & Wilson reference. It would have been obvious to one of ordinary skilled in the art at the time of applicants' invention to vary the concentrations as a point of law. See also MPEP 2144.05(I) wherein it sets forth, "A *prima facie* case of obviousness exists where the claimed ranges and prior art ranges do not overlap but are close enough that one skilled in the art would have expected them to have the same properties. ***Titanium Metals Corp. of America v. Banner***, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985)."

14. The remaining references cited in the search report as X references for claims 1-3 are considered cumulative to the references relied on in the above rejections over claim 3 or 3-6, respectively.

### ***Conclusion***

15. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Daniel S. Metzmaier whose telephone number is (571) 272-1089. The examiner can normally be reached on 9:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Randy P. Gulakowski can be reached on (571) 272-1302. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Daniel S. Metzmaier  
Primary Examiner  
Art Unit 1712

DSM